[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag.C.J.

February 3, 1939

DAWOODSHAH & CO.....Appellants

vs.

JOSEPH GLAS & ORS.....Respondents

[SELANGOR MAGISTRATE'S CIVIL APPEAL No. 2 of 1938]

Rule Committee (Supreme Court) Enactment, 1932, Rule No. 4 Sub-rules Nos. 8, 57 and 71—basis of taxation of costs of Magistrate's Court Appeals—practice on appeal against taxation.*

The appeal from the decision of the Magistrate having been dismissed with costs, the solicitors for the respondents carried in for taxation a fully itemised bill. The amount involved in the case was nearly $1,000 and had been tried by the Magistrate, Kuala Lipis, under the extended jurisdiction provisions, (Courts Enactment, Section 57 (ii) (b)). The hearing of the appeal occupied nearly two days. The Registrar, on taxation, stated that he had made it a rule to follow the old practice of allowing a lump sum of $150 as the ordinary maximum which should be allowed for costs upon an appeal from a Magistrate, but that, in this case, he was prepared to increase it owing to the sum involved and the time occupied on the hearing. He taxed the bill as a whole at $275 and disbursements. The Bill as filed amounted to $721 and disbursements. The respondents, without carrying in any objections, appealed directly to the Judge under 1932 Rule No. 4 sub-rule 71, by notice without stating any grounds of appeal. The appeal was heard in Chambers.

Held, that the procedure by way of appeal adopted in this case was correct as the appeal involved a question of principle but that notice of appeal should clearly specify the questions of principle to be raised on appeal.

Held further, that the Registrar had rightly exercised his discretion under the Rule Committee (Supreme Court) Enactment, 1932, Rule No. 4 Sub-rule 57.

APPEAL to the Judge in Chambers.

Ramani for the Respondents.

1932 Rule No. 4 Sub-rule 8 is mandatory and an itemised bill should be filed and must be taxed item by item according to the scale. The Registrar has a discretion under particular items to allow more or less. He has no discretion to ignore the bill altogether and assess a lump sum. The $150/- rule having been superseded by the present Rule is no longer available for application. No such special provision in the present Rule. The amount allowed is in any case, inadequate, having regard to the work involved. But for the special jurisdiction in particular magistrates this matter would have originated in the Supreme Court. To lay down even a rule of practice that $150/- should ordinarily be the limit of costs for appeals from a Magistrate is wrong in principle and is opposed to the present rule.

Briggs for the Appellants: On a preliminary point:

The right to appeal to the Judge without previous review by the Registrar is peculiar to this country. It must be confined to matters of principle and the notice of appeal should state the grounds of appeal. It is an irregularity not to do so. On the merits—There is provision in the present Rule by which a Registrar can assess a lump sum. The words "from any other cause" in Sub-rule 57 are not to be read *ejusdem generis* with the matters preceding them. *Re Commonwealth Oil Corporation*, (1917) 1 Ch. 404. The lack of any special scale of costs for dealing with Magistrates' Court Appeals, which are matters involving small sums not ordinarily dealt with in the Supreme Court, is a good reason for applying sub-rule 57. Although it would be wrong to apply an absolute maximum of $150/-, this is, in fact, fair remuneration in an ordinary appeal, and the Registrar is entitled to work on it as a standard. Here, he has allowed amply for the only points which could be taken into consideration as increasing that sum, and has increased it accordingly. The Registrar's discretion has been exercised and should not be interfered with.

Ramani in reply.

TERRELL, AG. C.J.—I think that under Sub-rule 71 only questions of principle can be raised on an appeal to the Judge without previous review by the Registrar. I also think that, for the assistance of the Court and to prevent embarrassment, the questions of principle which will be raised on the appeal should be set out in the notice of appeal and, if, in another case, this were not done, I might refuse to hear it, until the necessary particulars had been given. This matter has, however, been argued, and the point raised is one proper to be raised by this procedure. I am accordingly prepared to decide it. The old rule by which costs of Magistrate's Court Appeals were limited to $150/- was one which might work hardship in special cases, and it was no doubt for this reason that it was changed; but this does not indicate that a sum of $150/- is inadequate in ordinary appeals. I think that the Registrar, as taxing officer, has jurisdiction to exercise his discretion under Sub-rule 57, and to assess costs at a gross sum. In an ordinary appeal, I should not be prepared to say that his discretion was exercised wrongly if he allowed the sum of $150/-. This was not quite an ordinary appeal, in that the amount involved and the time occupied, were both larger than usual. The Registrar has made allowance for these two factors, and has, in his discretion, allowed nearly double the amount which he would have allowed for an ordinary appeal. I think he has exercised his discretion upon a proper basis and I am not prepared to interfere. The appeal will be dismissed with costs.

Appeal dismissed with costs

[APPELLATE CIVIL JURISDICTION]

AITKEN, J.

March 3, 1939

GURUVAMMAH (f)....Appellant (Defendant)

vs.

RAMASAMY.....Respondent (Plaintiff)

[N. S. MAGISTRATE'S CIVIL APPEAL No. 5 of 1938]

Labour Code (Cap. 154) S.82, S.85—Res judicata—Master and servant—claim for wages due — enquiry by Assistant Controller — subsequent action in Magistrate's Court.

*See now chapter 13.

Practice—appeal from Magistrate's decision —question of fact—conflict of oral testimony—circumstances in which Appellate Court may over-rule Magistrate.

The plaintiff claimed from the defendant in the Court of the Magistrate at Port Dickson $107.50 as balance of wages due to him as her "toddy supervisor." The defendant denied that she ever employed the plaintiff and pleaded that he had already prosecuted this claim before the Assistant Controller of Labour at Seremban who had dismissed it. The Assistant Controller of Labour had enquired into the matter under S. 82 of the Labour Code (Cap. 154) but had taken no action under S. 85 as in his opinion no wages were due. The Magistrate dismissed the claim. On appeal to the Court of a Judge:—

Held, no question of *res judicata* arose in this case, inasmuch as an Assistant Controller of Labour has no jurisdiction to entertain a claim for wages preferred by an Indian gentleman against an Indian lady.

Held, that where, as in this case, the evidence presents a direct conflict of oral testimony on a pure issue of fact, a Magistrate's decision must not be reversed unless the Judge hearing the appeal is convinced that the decision appealed from is wrong.

Powell and wife v. *Streatham Manor Nursing Home*, (1935) A.C. 243, applied.

MAGISTRATE'S CIVIL APPEAL.

Sen for the Appellant.

C. M. P. Pillay for the Respondent.

Cur. Adv. Vult.

AITKEN, J.—In this case the Plaintiff claimed $107.50 from the Defendant as being the balance of wages due to him for his services as her "toddy supervisor" during the period June 1st 1937 to April 30th 1938 inclusive. He averred that she had engaged him to work for her in that capacity at a salary of $15/– a month, and that she had paid him only $57.50 out of the total of $165/– due for eleven months wages at that rate. He therefore prayed judgment for the balance of $107.50

The Defendant denied that she ever employed the Plaintiff at any time and in any capacity, and pleaded that he had already prosecuted this claim in the office of the Controller of Labour at Seremban who had dismissed it. She prayed that the Magistrate's Court would also dismiss it, and with costs.

In the result it was the Plaintiff's prayer which was granted by the learned Magistrate at Port Dickson, and it is from his decision that the Defendant has brought this appeal.

Now I could deal with this appeal in a few brief words by pointing out—

(1) that there can be no question of "*res judicata*," because a Controller of Labour has no jurisdiction to decide a claim for wages preferred by an Indian gentleman against an Indian lady; and

(2) that where, as in this case, the evidence presents a direct conflict of oral testimony on a pure issue of fact, a Magistrate's decision must not be reversed unless the Judge hearing the appeal can be sure that his decision is wrong.

I have decided, however, to attempt an explanation of the law on this second point, because it does not seem to be widely realised that the principles enunciated in the great case of *Powell and wife* v. *Streatham Manor Nursing Home*, (1935) A. C. 243, are applicable to all civil appeals from Magistrates to Judges on issues of pure fact.

Before I can proceed with my attempt to explain the law I must say a few words about the facts, and I shall be as brief as possible because the facts in themselves are of very little importance. The Defendant is the widow of a gentleman who appears to have established considerable toddy contracting business in the neighbourhood of Port Dickson before he died on the 8th day of February 1936. The business passed to his widow on his death, and it is common ground that she has taken no active part whatever in the management of the business since that date, and has resided either at Seremban or Kuala Pilah. Yet, if the Plaintiff is to be believed, she interfered in the management of the business on one solitary occasion in order to appoint him, by word of mouth, to supervise the collection and sale of the toddy at $15/– a month. The only explanation the Plaintiff could offer to account for this singular and unprecedented act on her part was that both of them were Telegus. It is also somewhat difficult to understand why the Defendant should have needed the Plaintiff as her toddy supervisor, when she had an apparently competent manager living at Port Dickson and looking after the business for her, to whom she had given a full power of attorney.

I think I have already said enough to show that the issue between the Plaintiff and the Defendant in this case was a pure issue of fact, and dependent very largely on the view taken by the learned Magistrate of the balance of probabilities and the credibility of the two protagonists. True it is that several witnesses were called on both sides to support certain aspects of their principal's story, but their evidence amounted to little more than this: On the Plaintiff's side, that he had frequently been seen riding on the Defendant's lorry or at the various places where her business was carried on at or near to Port Dickson during the period in question. On the Defendant's side, that the Plaintiff's name did not appear in any of the books or wage sheets kept by the Defendant's attorney in connection with her business, and that the plaintiff's lorry rides and visits to her business places were accounted for (a) by the fact that a step-son and step-daughter of his were employed in the business, (b) by his fondness for a free drink of toddy. The Defendant's attorney also produced a ledger account of Plaintiff's step-son's wages, which showed that the Plaintiff himself had drawn $52.71 on account of those wages.

Upon this evidence, and in spite of the fact that the Defendant, when challenged on behalf of the Plaintiff, offered to swear in the temple that she had never engaged him in any capacity, the learned Magistrate gave judgment for the Plaintiff in the full amount claimed. He thought that the surrounding circumstances were so much in favour of the Plaintiff, and his witnesses so reliable, that he had to accept the Plaintiff's story

and reject that of the Defendant. By 'surrounding circumstances' I presume the learned Magistrate meant the Plaintiff's lorry rides and visits to the business, and not the Defendant's admitted non-interference therein; and I have already pointed out that the Plaintiff's witnesses did little more than prove those rides and visits. But I have no desire to criticise the learned Magistrate's grounds of judgment in detail. In effect he solved a direct conflict of oral testimoney between the Plaintiff and the Defendant by accepting the story told by the former and rejecting that told by the latter, and I cannot help thinking that he probably went wrong in doing so. The question then is, should I give effect to my own view of the probabilities in this case and allow the appeal, or should I dismiss it because I am not fully convinced that the learned Magistrate's decision is wrong, in other words because I entertain a reasonable doubt that it may possibly be right?

Civil appeals from Magistrates to Judges, and from Judges to the Court of Appeal in the Federated Malay States, have at least one feature in common with civil appeals from Judges to the Court of Appeal or the House of Lords in England. All such appeals are by way of re-hearing, but the appellate Court does not re-hear the witnesses.. In effect it is a re-hearing on the Judges notes of evidence (simplified in some cases by a transcript of a shorthand note of the evidence), and on any documents and other exhibits that may have been put in evidence. The jurisdiction of the appellate Court to reverse, vary or uphold the decision of the Court below, or to order a new trial, is free and unrestricted, but to quote the words of Lord Atkin in *Powell and wife* v. *Streatham Manor Nursing Home* (*ubi supra*)— "it must recognize the onus upon the appellant to satisfy it that the decision below is wrong: it must recognize the essential advantage of the trial Judge in seeing the witnesses and watching their demeanour. In cases which turn on conflicting testimony of witnesses and the belief to be reposed in them an appellate Court can never recapture the initial advantage of the Judge who saw and believed." In the same case Lord Macmillan said that he would have been ready to differ from the decision of the trial Judge, if the criticisms to which it had been subjected in the Court of Appeal and in the House of Lords had carried conviction to his mind that the trial Judge had gone wrong. As those criticisms had failed to convince the noble Lord, he expressed an opinion that no sufficient reason had been shown for departing from the decision of the trial Judge.

There are several passages in the judgments of the other noble Lords, who helped to decide that case, very much to the same effect, but I will cite only four of them. Thus Sankey, L.C. said:

> "there is a difference between the manner in which the Court of Appeal deals with a judgment after a trial before a judge alone and a verdict after a trial before a judge and jury. On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the Court that the judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence the Court of Appeal will have special regard to the fact that the judge saw the witnesses".

Lord Wright, quoting Lord Sumner, said:—

> "Not to have seen the witnesses puts appellate Judges in a permanent position of disadvantage as against the trial Judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case".

Later on in his judgment he says:—

> "Two principles are beyond controversy. First it is clear that in an appeal of this character, that is from the decision of a trial Judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal 'must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it 'is wrong': *per* Lord Kingsdown. cited with approval by Lord Sumner. And secondly the Court of Appeal has no right to ignore what facts the Judge has found on his impression of the credibility of the witnesses and proceed to try the case on paper on its own view of the probabilities as if there had been no oral hearing".

Finally, at the end of his judgment, Lord Wright said:—

> "I do not say that it was not a difficult case. I am not seeking to retry the case *de novo* and as if there had been no trial before the Judge. I do not know, nor is it material that I should know (if indeed I could), how I should have decided the case if I had tried it myself. It is enough to say that I am not convinced that the Judge was wrong".

That concludes my quotations from the judgments delivered in the House of Lords in the very remarkable case of *Powell and wife* v. *Streatham Manor Nursing Home* (*ubi supra*), in which three Judges of the English Court of Appeal unanimously reversed the trial Judge on a pure issue of fact, and five Judges of the House of Lords unanimously restored him. In this particular case now before me, all that I need do is to adopt Lord Wright's concluding words and say that I am not convinced that the learned Magistrate was wrong. The Defendant's appeal must therefore be dismissed, and with costs.

Appeal dismissed.